Editor's Note: Reconsideration denied by order dated Dec. 16, 1999

THE NAVAJO NATION

IBLA 98-135 Decided August 16, 1999

Appeal from a decision by the New Mexico State Office, Bureau of Land Management, approving coal preference right lease applications. NMNM 3752, etc. 1/

Set aside and remanded.

1. Administrative Procedure: Adjudication--Coal Leases and Permits: Applications

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Where BLM approves preference right lease applications for coal leases without documenting its reasoned analysis in reaching its conclusions, BLM's decision will be set aside and remanded for further adjudication.

APPEARANCES: Paul E. Frye, Esq., Joshua S. Grinspoon, Esq., and Daniel I.S.J. Rey-Bear, Esq., Albuquerque, New Mexico, for the Navajo Nation; Lawrence G. McBride, Esq., and Serena P. Wiltshire, Esq., Washington, D.C., for Ark Land Company; and Arthur Arguedas, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Navajo Nation (Navajo or Appellant) has appealed the December 19, 1997, Record of Decision (ROD) of the New Mexico State Office, Bureau of

---

1/ The serial numbers are: NMNM 3752 through 3755, NMNM 3835, NMNM 3837, NMNM 3918, NMNM 3919, NMNM 6802, NMNM 7235, NMNM 8745.

Land Management (BLM), approving 11 preference right coal lease applications (PRLA's) filed with BLM by Ark Land Company (Ark). 2/ These PRLA's were previously rejected by BLM on December 27, 1993, and, consequently, were the subject of a 1994 appeal to this Board by Ark. Their history pertinent to that appeal has been set forth in Ark Land Co., 139 IBLA 196 (1997). By way of introduction, in that opinion, we stated:

> At various times from 1967 through 1970, Ark or its predecessors-in-interest were issued Prospecting Permits under section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b) (1970). The regulations governing preference right coal leases appear at 43 C.F.R. Subpart 3430. An applicant for a preference right lease must make an "initial showing" of coal quantity and quality and must indicate the scope and schedule of its operations and mining methods. 43 C.F.R. § 3430.2-1. After environmental review, the applicant must make a "final showing" of entitlement, including information concerning estimated revenues; proposed means of meeting proposed lease terms; costs of developing a mine, removing, processing, and making coal salable; and estimated costs and revenues if coal is to be mined by a CMV. 43 C.F.R. § 3430.4-1.

Id. (footnote omitted).

In the previous appeal, BLM rejected the PRLA's on the basis that Ark had not included in its "final showing" certain data BLM deemed necessary, including a plan for and the cost of mining all recoverable reserves down to a stripping ratio of at least 10:1. In Ark, the Board set aside BLM's decision because BLM had rejected the coal lease applications without a substantive evaluation of the merits of the final showing that Ark had submitted, and remanded the matter back to BLM for a determination whether the lands sought to be leased contain coal in commercial quantities as would justify a "prudent person" in the expenditure of labor and means to establish a successful mine, as required by Departmental regulations at 43 C.F.R. § 3430.1-2. See Ark Land Co., supra. Now BLM's approval of these same PRLA's comes before us on appeal by Navajo, which was granted status as a Respondent/Intervenor in Ark's prior appeal. See Ark Land Co., supra at 203. 3/

2/ These PRLA's have been linked by Ark into a combined mining venture (CMV).

3/ Standing was granted Navajo in the prior appeal. Ark, however, moves the Board to dismiss the appeal on the basis that "[Navajo] cannot prosecute this appeal parens patriae." (Answer at 5-11.) In questioning Navajo's standing, Ark essentially asks the Board to reconsider its prior decision.

In addition to the rationale given in Ark Land Co., supra at 203, which cited our decision in Thermal Energy Co., supra at 304-06 (1996), we refer Ark to our decision in Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 122-127, 80 I.D. 441, 500-503 (1973), wherein we stated:

We remanded the determination back to BLM with instructions to "analyze Ark's showing that the coal resources it has found, admittedly limited to Ark's criteria, constitute `commercial quantities' under the regulations." We noted that:

> Although BLM's Decision cites 43 C.F.R. § 3430.4-1(d)(2), which requires an applicant to submit cost projections for operating a mine, the Decision fails entirely to review the cost analyses that were submitted by Ark. Accordingly, there has been no determination that the costs and related data submitted by Ark are based on either reasonable or unreasonable economic assumptions, and hence, no determination whether a prudent person would undertake a mining operation.

Ark Land Co., supra at 205. We therefore remanded the case file to the State Office for readjudication.

Navajo bases its appeal of the December 1997 ROD on three lines of argument. Navajo first argues that the ROD is not supported by substantial evidence and does not reflect reasoned decisionmaking. The second group of contentions addresses whether the prospecting permits which gave rise to the PRLA's were validly issued. Thirdly, Navajo argues that the ROD does not comply with applicable requirements of the National Environmental Protection Act, 42 U.S.C. §§ 4331-47 (1994), and the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (1994). For reasons set forth below, we set aside and remand BLM's ROD based upon Appellant's first set of arguments; we therefore do not reach questions arising out of the other claims.

The ROD currently before us begins by listing the name and address of the preference right applicant, and the precise location of the lands named in each PRLA. A brief history of the PRLA's is given, indicating that the PRLA's in question were filed in 1972, subsequent to issuance of

---

fn. 3 (continued)

"We distinguish between the right of [Navajo] to have its protest heard and fully considered in this Department and any ruling on the merits of its protest * * *.

* * * * * * *

This is not comparable to cases involving standing in court proceedings where actual injury to an organization or other legal entity cannot be shown.

Furthermore, it has long been recognized that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have a special relationship toward such tribe greater than that of a nonparticipating bystander, a sorveregn toward its ordinary citizens, or a landowner toward his tenant."
(Citations omitted.)

We decline to reverse our prior ruling, and hereby deny Ark's motion to dismiss for lack of standing.

prospecting permits on the properties in 1969 and 1970. Initial showings were requested in 1976; those showings were received by the Department in 1977 and 1980. The U.S. Geological Survey, at that time responsible for reviewing submittals filed pursuant to 43 C.F.R. § 3430, reported to BLM that the initial showings were adequate. Final showings were submitted in 1983, 1988, and again in 1993, due to regulatory changes, assignments, relinquishments, and other changing conditions. Id. Subsequent to summaries reporting why the Board rejected BLM's prior analysis and documenting public involvement, the decision then provides a "Summary of Commercial Quantities Determination," which we quote in its entirety:

> The BLM has reviewed the revised Final Showing provided by Ark and all additional information provided concerning the Final Showing.
>
> Using the information available, we have determined that Ark has reasonably estimated the coal quality and quantity of all eleven PRLA's coal reserves. We have also determined that the proposed mining plan is a reasonable plan to extract the coal reserves in a manner that conforms with Federal and local laws and regulations.
>
> Ark estimated operation costs were adjusted for inflation to account for the difference between 1992 costs (costs available when the Final Showing was produced) and 1997 costs (the costs available when the Final Showing was evaluated). The adjusted operating costs provided by Ark concerning manpower, equipment, supplies and material do not differ significantly from the costs that the BLM developed during the analysis. Values directly relating to the cost of complying with environmental regulations are very difficult to compare due to the varied way companies account the different aspects of environmental actions. For example, one company might consider the cost of water trucks and manpower as a mining cost and another company might consider those same costs as a cost of reclamation or dust control. For the purposes of our evaluation, a determination could be made that all aspects of the mining operation were reasonably addressed even though specific categories differed slightly. The net effect of the discrepancies was negligible and did not affect our determination that the mining and operation costs provided by Ark are reasonable.
>
> The BLM prepared a CED [Cost Estimate Document], comparing Ark estimated costs of complying with applicable environmental regulations, laws and stipulations with the estimated costs of complying with those same laws, regulations and stipulations as determined by the BLM. The [availability of the] CED was published in the Federal Register on October 7, 1997, dated October 1, 1997, and provided a comment period of 60 days. The BLM received two sets of comments during the comment period. The comments have been addressed in the CED.

> The profitability of the proposed mining operation was evaluated based on the information provided by Ark and on studies and analysis performed by the BLM. The BLM also considered market and transportation studies performed by various consulting firms, including Hill & Associate, pertinent to the San Juan Basin. A review of contracts within the potential power plant markets indicates that most plants have coal contracts that expire within the next 10 years therefore providing a potential opportunity for new suppliers to provide the necessary coal production. Additionally, existing operations that currently supply coal to these markets are increasingly encountering deeper, thus more costly, conditions in their efforts to supply existing contracts. Although the existence of a market for this coal is not definite, neither is the absence of a market definite. Conditions in the power industry are changing and deregulation could further affect both the coal and power industries, making it that much more difficult to predict the future. Due to the volatility of the industry it is difficult to say with any certainty that there will not be a market for the CMV coal.
>
> In summary, the BLM has determined that Ark has provided information justifying the existence of coal that is of marketable quality and quantity. The company has also provided a mine plan that is reasonable in its layout and basic costs. Ark did provide evidence of potential markets and the estimated transportation costs were inline [sic] with costs BLM obtained independently.

(Decision at 3-4.)

Finally, under the heading of Decision and Rationale, BLM states:

> The BLM has found that Ark has provided a Final Showing that reasonably depicts the extent, layout and probable costs necessary to develop the PRLA's. And while current market conditions do not indicate that success of the Ark PRLA's will be a certainty, neither do they indicate that failure of the PRLA's is a certainty. The volatility of the market place and the anticipated deregulation in the electricity market make a finding of no Commercial Quantities difficult at this time.
>
> The analysis has determined that:
>
> a) Arch [sic] has discovered coal in commercial quantities.
>
> b) Arch has used reasonable economic assumptions and data in support of a finding of commercial quantities of coal;

> c) Arch has demonstrated that the conditions and lease stipulations necessary to provide environmental protection can be adequately met.

(Decision at 4-5.)

Our concern with BLM's decision is that it leaves the Board pondering whether there is any valid basis on which BLM reached its conclusions. There are no references in the decision to any hard factual data submitted by Ark. There are no summations of any of the information of record. We are not presented with any detail of what BLM considered in reaching its conclusions, let alone what it considered significant, other than the environmental protection cost estimate document, which is not compared with any of Ark's submitted costs. BLM's decision, on its face, leaves us contemplating the question, how can BLM make a finding in favor of commercial quantities without providing more supporting data from the record? We concede that BLM is faced with making a difficult decision, but its approach in the ROD does not provide us with enough analysis to make a reasoned judgment concerning whether its decision is supported by a rational basis. See Larry Brown & Associates, 133 IBLA 202, 205 (1995).

[1] In Thermal Energy Co., 135 IBLA 291, 322 (1996), in a decision setting aside and remanding a BLM decision rejecting coal PRLA's, the Board stated:

> It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Larry Brown & Associates, 133 IBLA 202 (1995).

(Emphasis supplied.) See also Vulcan Power Co., 143 IBLA 10, 23 (1998), where the Board set aside and remanded a decision of BLM approving one geothermal unit over another for development in a unit and cooperative agreement, finding that

> the record BLM submitted consists almost entirely of documents filed by the parties when proposing their units and lacks the requisite documentation of BLM's review and decisionmaking process. We have specifically noted the absence of some items, and based upon the file and documents submitted, must conclude that the BLM Decisions are not supported by the record. In such a case, the Decisions are properly set aside and remanded. See Predator Project, 127 IBLA 50, 53 (1993), and cases cited; Shell

Offshore, Inc., 113 IBLA 226, 233-34, 97 Interior Dec. 73, 77-78 (1990); Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990).

In Southern Union Exploration Co., 79 IBLA 225, 226 (1984), within the context an appeal involving the awarding of competitive oil and gas leases, the Board stated:

> The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When BLM relies on that analysis in rejecting a bid as inadequate, it must ensure that a reasoned explanation is provided for the record to support the decision. Southern Union Exploration Co., 41 IBLA 81, 83 (1979). * * * The Board has elaborated on the reasons for this as follows:
>
> > [T]he appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal.
>
> Southern Union Exploration Co., 51 IBLA 89, 92 (1980).

(Citations omitted; emphasis supplied.)

The BLM Manual provides a template for BLM officials performing a final showing analysis. BLM Manual Handbook, H-3430-1, "Processing Coal Preference Right Lease Applications," Chapter VI. Chapter VI.H. sets forth the elements of the commercial quantities test, as follows:

> The commercial quantities test shall consist of:
>
> 1. A determination that the applicant has reasonably estimated the quality and quantity of coal for all beds which are cumulatively economic to mine on the PRLA or in the area of the combined mining venture. [Reference omitted.]
>
> 2. A determination that the applicant's proposed method of operation and reclamation is in conformity with all applicable laws, regulations, and lease conditions and stipulations.
>
> 3. A determination that all applicable costs and revenues have been considered and have been calculated in a reasonable manner.

> 4. A determination that the conditions or protective lease stipulations assure that environmental damage can be avoided or acceptably mitigated (43 CFR 3430.5-3(c)).
>
> 5. A determination that, when all of the above have been verified, the applicant has a reasonable prospect of producing coal at a royalty rate of 12 ½ percent for surface mines and 8 percent for underground mines at a profit.
>
> The determination of a reasonable expectation of profitability must be based on a complete analysis and evaluation of the information submitted in the final showing.

(Emphasis supplied.) (BLM Manual, H-3430-1, Rel. 3-173, 8/8/87, Chapter VI.H., at VI-5.) The provisions of the BLM Manual do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM. Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); Howard B. Keck, Jr., 124 IBLA 44, 55 (1992), and cases cited therein.

The Board will normally not substitute its own judgment for that of Departmental experts, but sufficient facts and a sufficiently comprehensible explanation must be present before the Board will affirm a decision and supporting rationale. David V. Udy, 81 IBLA 58, 62 (1984); Roger K. Odgen, supra at 8, 90 I.D. at 484; M. Robert Paglee, 68 IBLA 231, 234 (1982). In this case, the decision and case record disclose only the conclusions of BLM that applicant's proposed method of operation and reclamation is in conformity with all applicable laws and regulations, that all applicable costs and revenues have been considered and have been calculated in a reasonable manner, that the applicant has reasonably estimated the quality and quantity of coal for all beds which are cumulatively economic to mine on the PRLA's, that the conditions or protective lease stipulations assure that environmental damage can be avoided or acceptably mitigated, and that the applicant has a reasonable prospect of producing coal, while paying the required royalty rate, at a profit. It is clear, however, that both Ark and BLM have provided no evidence in the record, and certainly none in the decision appealed from, that coal, in commercial quantities, can be produced at a profit from these PRLA's. BLM has failed to address Appellant's claim of the unfeasibility of the transport of Ark coal over unimproved or nonexistent roads to an unimproved railhead, and then on to hypothetical markets, although Navajo claims BLM's own studies refute the feasibility of such a scheme. Because there is no sustainable basis for BLM's conclusion on the record before us, we are obligated to set aside BLM's decision and remand the matter to BLM to address squarely in its decision the basis on which it has determined Ark can produce coal in commercial quantities from the PRLA's.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the

decision appealed is set aside and remanded to the New Mexico State Office for further adjudication consistent with this opinion.

_____
James P. Terry
Administrative Judge

I concur:

_____
Gail M. Frazier
Administrative Judge